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No. 92-2007

In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS J. ROEHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a felon barred from holding state office had his "civil rights" restored within the meaning of 18 U.S.C. 921(a)(20), which exempts certain former felons from federal penalties for possessing firearms.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 977 F.2d 375.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992, and a petition for rehearing was denied on February 4, 1993. On April 7, 1993, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including June 19, 1993. The petition was filed on June 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of being a felon in possession of firearms, in violation of 18 U.S.C. 922(g). Because he had three prior convictions for violent felonies, petitioner was sentenced to the minimum 15-year prison term prescribed by 18 U.S.C. 924(e). The court of appeals affirmed in an unpublished order. Petitioner then sought relief in the district court pursuant to 28 U.S.C. 2255. The district court denied relief, and the court of appeals affirmed. Pet. App. 1a-7a.

1. The evidence at trial demonstrated that petitioner was a convicted felon who possessed firearms, in violation of 18 U.S.C. 922(g)(1). The firearms were discovered on September 15, 1988, during a search of the clubhouse of the "Outlaws" motorcycle gang in Milwaukee, Wisconsin. Petitioner, a gang member since 1971, was on "guard duty" at the time of the search. 89-2889 Gov't C.A. Br. (prior appeal) at 5-22. Petitioner was sentenced under the Armed Career Criminal Act, 18 U.S.C. 924(e), because he had three prior convictions for violent felonies: a 1966 burglary conviction, an August 1974 conviction for reckless use of a weapon, and a September 1974 conviction for armed robbery. See Pet. App. 1a-2a; Gov't C.A. Br. at 2-3.

2. After his conviction was affirmed, petitioner filed a collateral challenge pursuant to 28 U.S.C. 2255, claiming for the first time that his three prior state convictions could not support his federal conviction or sentence enhancement because his civil rights had been restored under Wisconsin law upon completion of

each state sentence. Section 922(g)(1) applies to persons previously convicted of "a crime punishable by imprisonment for a term exceeding one year," and 18 U.S.C. 921(a)(20) further provides:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Although petitioner had been convicted of three prior felonies, he claimed that those convictions should have been excluded from consideration under Section 921(a)(20) as a result of a Wisconsin law providing that "[e]very person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his sentence." Wis. Stat. § 57.078 (later recodified, as amended, at Wis. Stat. Ann. § 304.078 (1991)). Petitioner claimed that his prior failure to raise this claim should be excused because he had received ineffective assistance of counsel in the prior proceeding. The district court denied relief. Pet. App. 2a.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court considered it "clear that Wisconsin does not consider a conviction to have been wiped from the record once the person convicted has satisfied his sentence." *Id.* at 3a. In particular, the court

observed that Wis. Stat. § 57.078 "does not restore the right to hold public office." Pet. App. 3a (citing Wisconsin case law and commentary). Moreover, the court noted that Wisconsin uses the fact of prior conviction as a predicate for liability under its own felon-with-a-firearm statute, despite the operation of Section 57.078. Pet. App. 3a-4a, citing Wis. Stat. § 941.29 (Supp. 1992) (effective Mar. 31, 1982). Thus, the court rejected petitioner's contention that Section 57.078 had restored his civil rights for purposes of Section 921(a)(20).

Petitioner further claimed that he had received an official "Discharge" certificate in 1970 upon completing his 1966 sentence, although he could not produce the original or a copy of the certificate. The court explained, however, that such a form was "routinely issued upon satisfaction of sentence," and "referred to Wis. Stat. § 57.078 which, although using general language, has been construed to deal primarily with the right to vote, and not to restore the right to hold office." Pet. App. 5a. The court "conclude[d] that even if [petitioner] received this form of 'Discharge,' it was not a restoration of civil rights under § 921(a)(20) and did not prevent counting his 1966 conviction toward enhancement." *Id.* at 6a.

Finally, the court recognized, Pet. App. 6a, that petitioner had waived his claims by failing to raise them at trial or on direct appeal, unless he could establish "that the failure was constitutionally deficient performance by his counsel and that if the claim[s] had been raised, the result would probably have been different." In the court's view, however, the question of prejudice "merge[d]" with the merits of petitioner's claims, so that "[b]y deciding that [petitioner's] claims had no merit * * * [the court also]

decided that he was not prejudiced by his counsel's failure to raise them." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner had not had his "civil rights" restored within the meaning of 18 U.S.C. 921(a)(20) because under Wisconsin law his prior convictions continued to bar him from holding public office.

1. Section 921(a)(20) excludes from consideration, for purposes of the federal firearms disability and sentence enhancement imposed by Sections 922(g) and 924(e), any prior conviction for which the defendant "has had civil rights restored," unless the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(20). Accordingly, in determining whether to count a prior conviction a court must engage in a two-step process: it must "first ascertain whether a felon's civil rights are substantially restored under state law; if they are, only then [does the court] determine whether state law expressly restricts his right to possess firearms." *United States* v. *Meeks*, 987 F.2d 575, 578 (9th Cir. 1993).

Applying the first step of this inquiry, the courts of appeals have held that a former felon's civil rights are substantially restored under state law only if he "regains the rights to vote, to sit on a jury and to hold public office in the state in which he was originally convicted." *United States* v. *Dahms*, 938 F.2d 131, 133 (9th Cir. 1991); see also, *e.g.*, *United States* v. *Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990); *United States* v. *Thomas*, 991 F.2d 206, 214 (5th Cir. 1993); *Meeks*, 987 F.2d at 574 (rights not substantially restored where

not allowed to serve on juries or as sheriff or highway patrol officer); *Presley* v. *United States*, 851 F.2d 1052, 1053 (8th Cir. 1988) (same).

Here, the court of appeals accepted the Wisconsin Court of Appeals' conclusion that Wis. Stat. § 57.078 (1971)—the state provision that petitioner claims automatically restored his civil rights—does not restore the right to hold public office. Pet. App. 3a, citing *State* v. *Village of Lyndon Station*, 295 N.W.2d 818, 826-827 (Wis. Ct. App. 1980), aff'd on other grounds, 305 N.W.2d 89 (Wis. 1981). Petitioner does not challenge that interpretation of state law. Because Wisconsin law precluded petitioner from holding public office, his civil rights were not substantially restored, and his prior convictions were therefore not excluded from consideration for federal firearms disability purposes under 18 U.S.C. 921(a)(20). Petitioner has cited no case from any court of appeals holding that a former felon could have his civil rights restored for these purposes without regaining the right to serve in public office. There is thus no support for his contention, Pet. 32, that if he had been prosecuted in another circuit his conviction would have been reversed.

2. Petitioner's arguments that the decision below conflicts with decisions of other courts depend on the incorrect assumption that all of his civil rights (other than any right he might otherwise have to possess firearms) were restored after completion of his sentences. Virtually all the issues that petitioner claims have divided the courts of appeals involve the extent to which various state limitations on a former felon's right to possess firearms constitute "expres[s] provi[sions] that the person may not ship, transport, possess, or receive firearms" within the

meaning of 18 U.S.C. 921(a)(20). Because the Wisconsin statute did *not* substantially restore petitioner's civil rights unrelated to firearms, the legal issues that petitioner raises are not presented by this case.

First, petitioner claims (Pet. 10-14) that there is confusion among the circuits as to what courts may consider in determining whether a State has restored a former felon's civil rights. To the contrary, the courts of appeals uniformly examine "the whole of state law," as well as any particular document that a former felon may have received from the State, to determine whether an individual's civil rights have been restored. See, *e.g.*, *Cassidy*, 899 F.2d at 548-549; *Thomas*, 991 F.2d at 212-213; *United States* v. *Gomez*, 911 F.2d 219, 220 (9th Cir. 1990). Petitioner alludes to questions that might arise if a State issued an unequivocal certificate purporting to restore all of an individual's civil rights, yet had in place laws restricting a former felon's right to possess firearms. Pet. 12-14; see *United States* v. *Erwin*, 902 F.2d 510, 512-513 (7th Cir.) (dictum), cert. denied, 498 U.S. 859 (1990).[1] But petitioner's case raises no such issue.

[1] Petitioner also claims (Pet. 28-32) that there is a conflict regarding whether "an individualized action is required by the state before a felon's civil right to bear a firearm can be restored." Pet. 28. While the court of appeals did state that it thought it "arguable, at least, that the restoration of civil rights intended under 18 U.S.C. § 921(a)(20) must be an individualized decision," Pet. App. 5a, it did so by way of dictum questioning the force of the earlier dictum in *Erwin*, from a different panel of the same court, concerning the proper result in case of a conflict between state law in general and the explicit terms of a former felon's discharge certificate in particular. Because the court in this case clearly determined that neither petitioner's discharge certificate nor general

See Pet. App. 5a (discharge form petitioner claims to have received referred specifically to provision of state law that does not restore right to hold public office).[2]

Second, petitioner claims (Pet. 14-23) that the courts of appeals are divided as to whether a state statute enacted after the restoration of an individual's rights may be given retroactive effect. Again, however, the decisions petitioner cites involve the effect of statutory restrictions on firearms possession enacted after a former felon's civil rights have been restored. Any divergence in views on that issue would be irrelevant to petitioner's case. The court of appeals in this case did not hold that subsequently enacted Wisconsin firearms restrictions negated the effect of a prior restoration of civil rights; it considered those subsequent restrictions "only as evidence" that Wisconsin had not substantially restored petitioner's civil rights in the first place. Pet. App. 4a.

Finally, petitioner alleges (Pet. 24-27) a conflict among the courts of appeals over the effect under

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provisions of state law purported to restore his right to hold public office, this intra-circuit exchange of views on unpresented issues is irrelevant to petitioner's case.

[2] *United States* v. *Swanson*, 947 F.2d 914 (11th Cir. 1991), does not support petitioner's assertion of a conflict. The *Swanson* court examined the certificate of restoration involved in that case in the context of Alabama statutory and case law—*i.e.*, the "whole of state law"—and concluded that the Alabama Pardon Board had validly restored not only Swanson's "right to vote, to sit on a jury, and to hold elective office" but also his "right to possess firearms." *Id.* at 916-919. Here, in contrast, Wisconsin law does not allow restoration of a former felon's prior right to hold public office. Pet. App. 3a.

Section 921(a)(20) of a state statute that restricts former felons whose civil rights have otherwise been restored from possessing some but not all firearms. That issue is not even remotely raised by, or related to, this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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